



*In the*  
**Supreme Court of the United States**

NO. 78-1541

CHARLOTTE B. HOWELL,  
*Petitioner,*

*v.*

MITTEN H. GATES and C.B.H. CABIN, INC.,  
*Respondents*

---

**RESPONDENTS' BRIEF IN OPPOSITION TO  
PETITIONER'S PETITION FOR WRIT OF  
CERTIORARI TO THE COURT OF APPEALS  
FOR THE STATE OF COLORADO**

---

JOSEPH M. MONTANO  
ROBERT F. WILSON  
GORSUCH, KIRGIS, CAMPBELL,  
WALKER AND GROVER  
1200 American National Bank Building  
Denver, Colorado 80202  
(303) 534-1200

*Attorneys for Respondents*

May 9, 1979

## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE CASE .....	1
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI	
I. NO FEDERAL QUESTION IS PRESENTED BY THIS CASE .....	5
II. PETITIONER HAS FAILED TO COMPLY WITH CERTAIN JURISDICTIONAL AND PROCEDURAL REQUIREMENTS UNDER THE RULES OF THIS COURT .....	9
CONCLUSION .....	10

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>Cases Cited:</b>	
Commissioner v. Duberstein, 363 U.S. 278, 80 S. Ct. 1190, 4 L.Ed. 2d 1218 (1960) .....	6, 7
Commissioner v. W. H. Wemyss, 324 U.S. 303, 65 S.Ct. 652, 89 L.Ed. 958 (1945) .....	6
Donohue v. Vosper, 243 U.S. 59, 37 S.Ct. 350, 61 L.Ed. 592 (1917) .....	6
Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950) .....	6
<b>Statutes:</b>	
28 U.S.C. § 1257 (3) .....	5
<b>Rules of the U.S. Supreme Court:</b>	
U.S. S.Ct. Rule 19, U.S.C. ....	8
U.S. S.Ct. Rule 21(3), 28 U.S.C. ....	10
U.S. S.Ct. Rule 23(f), 28 U.S.C. ....	9
U.S. S.Ct. Rule 48, 28 U.S.C. ....	9
<b>Miscellaneous:</b>	
2 <i>Restatement of Conflict of Laws 2d</i> , § 223 (1971) .....	6
2 <i>Restatement of Conflict of Laws 2d</i> , § 256 (1971) .....	5
Treas. Reg. § 25.2512-8 (1958) .....	6, 7

## In the Supreme Court of the United States

NO. 78-1541

CHARLOTTE B. HOWELL,  
*Petitioner,*

*v.*

MITTEN H. GATES and C.B.H. CABIN, INC.,  
*Respondents*

---

### RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF COLORADO

---

Respondents pray that Petitioner's Writ of Certiorari to review the judgment and opinion of the Court of Appeals of the State of Colorado, entered in the above-entitled action on August 10, 1978, be denied, or, in the alternative, dismissed.

### STATEMENT OF THE CASE

Prior to February 18, 1963, Petitioner was the owner of certain real property located in Jefferson County, Colorado ("Cabin Property"), which was the subject of the controversy below. At the request of Petitioner, an attorney investigated several mechanisms whereby Petitioner could make a gift of the Cabin Property to Respondent Gates without significant tax implications (R. 579, 753-754, 806-812, 1029-1034, 1054-1058). After rejecting several alternatives, Petitioner's attorney chose a procedure whereby the Cabin Property was conveyed to Respondent C.B.H.

Cabin, Inc. ("Cabin, Inc.") in return for all of its then outstanding stock. Thereafter, the stock was to be conveyed to Respondent Gates in a piecemeal fashion over a period of time (R. 385, 546-553, 563-576, 829; R. Pltf. Exs. A-E, R. 546, 578, and 612). The purpose was to give the Cabin Property to Respondent Gates while allowing Petitioner a certain *limited* usage of the property during her lifetime (R. 1068).

Respondent Cabin, Inc. was formed as a Colorado corporation on February 18, 1963 (R. Pltf. Ex. B; R. 612). By bargain and sale deed dated February 18, 1963, Petitioner conveyed the Cabin Property to Respondent Cabin, Inc. in return for 50 shares of its common stock ("Cabin Stock") (R. Pltf. Exs. C and D-1, R. 578; R. 828). The deed conveying the Cabin Property to Respondent Cabin, Inc. contained no language which limited or otherwise controlled the conveyance of the real property to it (R. 385-387). Thereafter, Petitioner made a gift of ten shares of Cabin Stock to Respondent Gates in each of five years beginning in December 1963 and ending in December 1967 (R. 386; R. Pltf. Ex. D, R. 578). None of the stock certificates issued to Respondent Gates contained any language which limited or otherwise controlled the transfer of the Cabin Stock (R. 386-387). As of the final gift of Cabin Stock, the outstanding 50 shares of Cabin Stock were held by Respondent Gates (R. 636, 676, 830-831).

At the time of the last gift of Cabin Stock, Petitioner sent a letter to Respondent Gates stating that the December 1967 transfer was a final gift and that Petitioner hoped Respondent Gates would cherish the Cabin Property (R. 386; R. Pltf. Ex. CC, R. 624). During the gift period, Petitioner paid the taxes and expenses of the Cabin Property through her Colorado attorney, and she continued to pay the real estate taxes after the last gift pursuant to her undertaking in the December 1967 gift letter to Respondent Gates (R. 387).

With the possible exception of an inquiry in September 1966, no apparent controversy between Petitioner and Respondent Gates arose as to Respondent Cabin, Inc. or the Cabin Property until 1970. In 1966, Petitioner inquired of her Colorado attorney concerning whether or not she could make a gift of her remaining Cabin Stock to one of her other daughters (R. Pltf. Ex. V, R. 624). It is of note here that Respondent Gates became increasingly concerned with the apparent undue influence which that sister was observed to be having on Petitioner in connection with the Cabin Property, among other family affairs (R. 1258, 1309-1312, 1320). The sister's entry into the picture was confirmed by a former attorney for a charitable foundation formed by Petitioner, which was the owner of property adjacent to the Cabin Property (R. 1378-1380).

In the fall of 1970, the so-called "Mitten" incident occurred. Although the controversy really concerned some personal property which was stored by the Petitioner on the Cabin Property, it prompted Respondent Gates to become concerned with her rights of access over the adjacent property controlled by Petitioner's foundation, which provided the only reasonable means of access to the Cabin Property (R. 1202-1203, 1209-1223, 1285-1288). Respondent Gates' rights of access were again of some concern to her in 1971 (R. 1241-1244).

In 1972, Respondent Gates found out through the caretakers of the adjacent foundation property that the 1971 property taxes due in 1972 with respect to the Cabin Property had not been paid, and Respondent Gates decided to pay the taxes to avoid the possibility that the property would be taken for unpaid property taxes (R. 1247-1250, 1310). Later, during a meeting with Petitioner in Acapulco, Mexico in May 1972, Respondent Gates was informed by Petitioner that the property taxes on the Cabin Property had not been paid and that Petitioner would be unable to continue to pay the taxes and maintain the Cabin Property.



in the future (R. 1165, 1247-1254, 1256-1258). This statement was confirmed by the former attorney for Petitioner's foundation, who also attended the meeting and heard the conversation (R. 387-388, 1389-1396). Shortly thereafter, in July 1972, Respondent Gates was removed as a trustee of Petitioner's foundation, and Petitioner, through a California attorney, sent a letter in August 1972 requesting Respondent Gates to reconvey the Cabin Stock to Petitioner (R. 388-389; R. Pltf. Ex. NNN, R. 1094). The request and the assertions in that letter were denied by Respondent Gates (R. Pltf. Ex. SSS, R. 1097; R. 1096-1100).

The demand letter also precipitated further action by Respondent Gates to protect her interest in Cabin, Inc. and the Cabin Property. In September 1972, Respondent Gates held a shareholder's meeting after mailing notice of the meeting to Petitioner (R. 390, 1106-1111, 1121-1128; R. Def. Ex. 4, R. 1471; R. 1465-1470, 1472-1474). A new slate of directors and officers for Cabin, Inc. was appointed (R. 390, 1130-1134; R. Pltf. Ex. TTT, R. 1129; R. Pltf. Ex. UUU, R. 1133). Thereafter, the Cabin Property was conveyed to Respondent Gates, as nominee (R. 390; R. Pltf. Ex. VVV, R. 1145; R. Pltf. Ex. BBBB, R. 1278). This was done by Respondent Gates to protect the Cabin Property from being taken without her knowledge (R. 1108).

Another incident concerning the Cabin Property occurred in the fall of 1973. Prior to the incident, Respondent Gates had hired a caretaker for the Cabin Property. This was objected to by Petitioner's representatives (R. 1171-1172). Also, there was an incident involving the cutting of dead trees on the Cabin Property, which, apparently, prompted inquiry of legal counsel as to Petitioner's legal position (R. Def. Ex. 7, R. 1603; R. 1597-1598).

In June 1974, Respondent Gates reconveyed the Cabin Property to Cabin, Inc., and then caused the liquidation of Cabin, Inc. The Cabin Property was then distributed to

Respondent Gates in complete liquidation of her ownership of all outstanding Cabin Stock (R. 390; R. Pltf. Exs. BBBB, CCCC and DDDD, R. 1278). Thereafter, Petitioner commenced an action to recover the Cabin Property in August 1974 (R. 1-14).

Upon submission of the matter, with extensive briefs also being filed by the parties, the trial court entered its Finding of Fact, Conclusions of Law, and Order quieting title to the Cabin Property in Respondent Gates and enjoining Petitioner's interference with Respondent Gates' right of access to the Cabin Property (Petitioner's Brief, Appendix D). The decision of the trial court was affirmed by the Colorado Court of Appeals (Petitioner's Brief, Appendix A). The Colorado Supreme Court denied Petitioner's Petition for Writ of Certiorari (Petitioner's Brief, Appendix B).

## REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

### I. No Federal Question Is Presented by This Case

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257(3). To come within this jurisdictional provision, Petitioner must establish that there is a federal question for this Court to review. No federal question is present in this case for it involved only the issue of whether or not Respondent Gates was the owner of the Cabin Property under Colorado law.

As stated by the trial court, the central issue before it was "... the effect of the method chosen by [Petitioner] to transfer the cabin property which [was] the subject matter of [the] suit." (Petitioner's Brief, Appendix D, p. 10a). It is axiomatic that the validity of the exercise of a power to transfer property and the rights created thereby are determined by reference to local law. 2 *Restatement of Conflict of Laws* 2d, § 256 (1971). Furthermore, the law of the situs (Colorado in this case) controls the validity of a

transfer of real property. 2 *Restatement of Conflict of Laws* 2d, § 223 (1971). Thus, title to property is essentially a local law question involving an appreciation of the evidence as to the conduct of the parties, and this Court does not review such matters. See e.g., *Donohue v. Vosper*, 243 U.S. 59, 65-66, 37 S.Ct. 350, 61 L.Ed. 592 (1917); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 674, 70 S.Ct. 876, 94 L.Ed. 1194 (1950).

Petitioner seeks to inject federal gift and estate tax principles into this case in an attempt to lend credence to the position that there is some federal question present here. However, as continually asserted by Respondents throughout the various proceedings below, this was not a federal tax case, nor did principles of federal taxation have any bearing on the outcome of this case as a matter of local law.

The distinction, which Petitioner has continually failed to perceive, is that the federal taxing statutes do not use the term gift in the common law sense. *Commissioner v. Duberstein*, 363 U.S. 278, 285, 80 S.Ct. 1190, 4 L.Ed. 2d 1218 (1960). That is, common law considerations were not embodied in the federal gift tax, and Congress used the term gifts in a broader and more comprehensive sense. *Commissioner v. W. H. Wemyss*, 324 U.S. 303, 306, 65 S.Ct. 652, 89 L. Ed. 958 (1945). This distinction has been recognized by the Internal Revenue Service in its Regulation which states:

Transfers reached by the gift tax are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration to the extent that the value of the property transferred by the donor exceeds the value in money or money's worth of the consideration given therefor.

Treas. Reg. § 25.2512-8 (1958). Furthermore, the federal gift tax statute does not test for the existence of a gift on the basis of the common law concept of gift—donative intent. *Commissioner v. Duberstein*, *supra*, 363 U.S. 286. The expansive concept of a gift for tax purposes carries over to the ancillary provisions of the federal estate tax.

Petitioner's latent hopes or expectations as to the tax treatment of her gift were obviously of little probative value to the trial court and the Colorado Court of Appeals. Furthermore, Petitioner never established, or attempted to establish, that the matter had been questioned by the federal tax authorities. All that was ever presented to the trial court with respect to this possible issue was some obviously biased testimony of Petitioner's accountant (R. 1535-1536; R. Def. Ex. 5, R. 1547, R. Def. Ex. 7, R. 1603; R. Pltf. Ex. ZZZ, R. 1270-1271). His "opinion" hardly rose to the status of a formal challenge or binding determination by the taxing authorities.

Respondents submit that the Colorado courts cannot be viewed as having recognized a tax avoidance device which improperly avoided federal estate or gift taxes. The Colorado courts merely determined, as a matter of Colorado law, that Petitioner had made a legally binding transfer of the Cabin Property to Respondent Gates, and, therefore, quieted title in Respondent Gates. It seems obvious that such a determination presents no federal question under either the federal gift tax or estate tax.

Petitioner also asserts a federal question based upon an alleged violation of Petitioner's right of due process under the Fourteenth Amendment to the United States Constitution. How a violation of Petitioner's due process rights arose in the context of this case totally escapes Respondents. For a person to commence a civil lawsuit and carry it through the highest state court and then assert that due process rights have been violated is tantamount to saying that due

process exists only when you win the case. Obviously, this is an implausible allegation. Additionally, Petitioner has not raised the due process issue below, and, as discussed hereafter, this failure prevents Petitioner from raising the issue before this Court.

However, granting some credence to Petitioner's due process argument (which Respondents do not), there has been no violation here. The substance of Petitioner's argument is that the Colorado courts ignored the "unrefuted" testimony of Petitioner as to her intent. However, even a cursory review of the record will demonstrate that such "unrefuted" testimony was in fact contradicted by various witnesses' testimony and documentary evidence. Most significant of the documentary evidence was a letter from the Petitioner to Respondent Gates dated December 1, 1967, expressing completion of the transfer of the entire Cabin Property as a final gift (R. Pltf. Ex. CC, R. 624). Further, the courts placed reliance on contradicting testimony that Petitioner told Respondent Gates to take responsibility for the Cabin Property (Petitioner's Brief, Appendix A, p. 4a; Appendix D, pp. 9a-10a and 15a-16a). It is submitted that the record will not support Petitioner's alleged violation of her due process rights.

On the basis of the foregoing, Respondents submit that no federal question is presented by this case. Petitioner's "bootstrap" arguments must be recognized for what they are. This case does not give rise to special and important reasons for which this Court will exercise its discretionary power of review. *Cf.* U.S. S.Ct. Rule 19, 28 U.S.C. The Court should not waste its valuable time with this case. The issue of ownership has been properly decided in favor of Respondent Gates by the Colorado courts as a matter of local property law, and their decision is supported by the record.

## **II. Petitioner Has Failed To Comply With Certain Jurisdictional and Procedural Requirements Under the Rules of This Court**

As discussed above, no federal question is presented by this case, and the lack of a federal question is fatal to any assertion that this Court may assert jurisdiction for purposes of reviewing the case. The issue regarding violation of Petitioner's due process rights was not raised during the proceedings below. The rules of this Court require that Petitioner must specify the stage of proceedings in the courts below at which, and the manner in which, the federal questions sought to be reviewed were raised and passed upon by the lower courts. U.S. S.Ct. Rule 23(f), 28 U.S.C. Petitioner's due process contention is asserted for the first time before this Court and, therefore, the express requirements of Rule 23(f) cannot be met by Petitioner. While the record will indicate that Petitioner attempted to inject tax principles into this case, the attempt failed for the very reason that the issue in this case was who owned the Cabin Property not what the taxing authorities might do. (R. 1536). However, even as to this alleged federal question, Petitioner has failed to comply with Rule 23(f).

The rules of this Court require that the real party in interest petition this Court for the writ. Petitioner's brief states that the Petitioner passed away and that a personal representative was appointed to carry on this litigation (Petitioner's Brief, p. 3). However, there is no indication in the Petitioner's brief as to who the personal representative is, nor is there any record of substitution below. Respondents are not aware of any substitution of parties below or before this Court. Respondents submit that there is no party in interest empowered to petition for a Writ of Certiorari in this case. Therefore, the Petitioner's Petition for Writ of Certiorari should be dismissed for mootness. U.S. S.Ct. Rule 48, 28 U.S.C.



The rules of this Court require that Petitioner must notify Respondents of the date of filing and the docket number of this case. U.S. S.Ct. Rule 21(3), 28 U.S.C. To the best knowledge and belief of Respondents, the foregoing rule has not been complied with by Petitioner.

Petitioner's significant failure to comply with the jurisdictional and procedural rules of this Court is cause for this Court to dismiss the instant Petition. Respondents submit that the Court may and should dismiss the Petition for the foregoing reasons.

### CONCLUSION

For the substantive reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should not be granted, or, in the alternative, it should be dismissed for failure to comply with the jurisdictional and procedural requirements of the rules of this Court. Given the obvious lack of a federal question thereby indicating that the Petition is singularly without merit, Respondents request the Court to consider such further and additional relief as may be appropriate in this case.

Joseph M. Montano  
Robert F. Wilson  
GORSUCH, KIRGIS, CAMPBELL,  
WALKER AND GROVER  
1200 American National Bank Building  
Denver, Colorado 80202  
(303) 534-1200  
*Attorneys for Respondents*

May 9, 1979

### CERTIFICATE OF SERVICE BY MAILING

I hereby certify that I did on this 9th day of May, 1979 mail a true and exact copy of the foregoing Respondents' Brief in Opposition to Petitioner's Petition for Writ of Certiorari to the Court of Appeals for the State of Colorado, by United States mail, with proper postage prepaid, to:

Jay L. Gueck  
Morrato, Gueck & Colantuno, P.C.  
1100 Life Center Building  
Denver, Colorado 80203

and

Bennett Rolfe  
LeBel & Rolfe  
411 First Federal Building  
401 Wilshire Boulevard  
Santa Monica, California 90401

/s/ Robert F. Wilson

---

Robert F. Wilson